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Civil No. 389-57-Y

# In the
# United States Court of Appeals
## For the Ninth Circuit

UNITED STATES OF AMERICA,
*Libelant and Respondent,*
vs.
ONE 1957 LINCOLN PREMIER TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, ITS TOOLS AND APPURTENANCES,
*Respondent and Appellant.*

Appeal from a judgment of forfeiture of an automobile in the United States District Court, Southern District of California, Central Division

## Appellant's Opening Brief

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| UNITED STATES OF AMERICA,<br>*Libelant and Respondent,*<br>vs.<br>ONE 1957 LINCOLN PREMIER TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, ITS TOOLS AND APPURTENANCES,<br>*Respondent and Appellant.* | District Court Civil No. 389-57-Y |

# Appellant's Opening Brief

This is an appeal from a judgment forfeiting one 1957 Lincoln Premier automobile, owned by Joseph D'Agostino, seized and forfeited by the government for alleged violation of the Internal Revenue laws.

## I.

## JURISDICTION

Jurisdiction is conferred by Title 28, Section 2101, U. S. Codes. Judgment was entered on July 3, 1957 and notice of appeal was duly filed on July 18, 1957.

## II.

## STATUTES INVOLVED

Section 7302, Internal Revenue Code of 1954 provides as follows:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the Internal Revenue Laws or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in Chapter 205, of Title 18, of the United States Codes, and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provisions of the Internal Revenue Laws or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence, relating to seizures, forfeitures, and disposition of property or proceeds for violation of the International Revenue Laws."

Fifth Amendment

> " . . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

## THE FACTS

The appellant was charged with receiving wagers on February 28 in this automobile (R. 6).

It was stipulated that the appellant was the registered owner of the vehicle and that he was not possessed of a federal wagering tax stamp (R. 3). It appears that on February 27, 1957, Officer Joseph S. Deiro, was conducting an investigation on bookmaking activities, at the location of 2602 West Grand Avenue, in the City of Alhambra (R. 4). He went to this address at about five fifteen o'clock, and the telephone at that address rang, and he advised the man who spoke through the telephone that he had arrested a Sam D'Agostino, for suspicion of bookmaking. (R. 7). The man suggested that the officer meet him in a 76 Gas Station, at Fremont and Main Street, in Alhambra, in twenty minutes; and he went to the location where he met Joseph D'Agostino (R. 7). At that time he had a conversation with Joseph D'Agostino, the owner of the automobile, leading to the arrest of his brother at the apartment, at which time Joseph D'Agostino stated it was his book and that all that he was interested in was getting a copy of the betting markers or getting a copy of the sheets. (R. 9). He had a Lincoln automobile which is the subject of the forfeiture. The officer said he could not give D'Agostino the sheets but he could let him copy them, and the appellant then copied the sheets. He had a conversation with the appellant regarding his bookmaking activities, and he stated that he had settled one of his

accounts at the fights. That is the only conversation he had regarding the use on his activities in the book-making field. He didn't say how he got to the fights. He gave the officer a hundred dollars in order to let him copy the betting markers, so that the persons who had bet with him would not put in a false claim against him, and in order to keep him from losing more money than he would have normally. The betting markers that he copied were those found at the house on a previous occasion, and on the 28th he had them with him. (R. 12). He copied both the sheets and the betting markers (R. 13, 14). All he did at the drive in stand was to drink some coffee with D'Agostino and have a conversation. (R. 15). When he saw D'Agostino he didn't give him any wager on any horse. He didn't bet with him (R. 16). Ira B. Dole, a police officer, of the City of Los Angeles, said he had a conversation with the appellant, in which the appellant related he used the car to make weekly visits to his brother's, where he would either pay or collect the amounts won or lost from them, and that on one occasion he would make a weekly visit to an agent who had three or four or five accounts, and he would either pay or collect the amounts won or lost from this agent. (R. 19). At the time he arrested D'Agostino, he had a copy of the sheet that his fellow officer had brought to him. The officer had decided to arrest the appellant at the time he met the fellow officer to copy the sheets, because in copying the sheets he believed he was violating some kind of law and he was going to arrest him. (R. 24).

The fellow officer brought the sheets out there, let D'Agostino copy the sheets. The officers, in arranging for a meeting with the appellant, were alert for the possibility of a seizure of a car (R. 28). A search was made of the automobile, and there were no betting markers, betting paraphernalia, except what were copies on yellow-ruled paper from the information the officer handed to him for him to copy and which he took from the appellant himself (R. 29). When he saw the appellant, he told him he was investigating the other officer having taken a hundred dollars (R. 31). After his fellow officer departed from the drive-in, he arrested D'Agostino. The automobile had not moved any place. During the interrogation, the name Lincoln car was mentioned by D'Agostino or himself. (R. 33).

The Lincoln automobile was seized on the 28th of February, 1957. Prior to seizing the automobile, there was no warrant of seizure (R. 37).

The appellant was called under Rule 43b (R. 38). He admitted he was the owner of a Lincoln automobile on February 28, 1957. He denied that he was a bookmaker on that date (R. 39).

Carl Anthony Landy testified that he had made arrangements with D'Agostino over the telephone to meet him at the drivein on Sunset and Vermont (R. 51). The police officer, named Joe Darrow, said something to the effect to Mr. D'Agostino, "If you want that information, you will have to come with me into

the car." The appellant, Joseph D'Agostino denied positively that he had any interest in the activities of his brother at the time he was arrested for bookmaking (R. 58). The discussion he had with the officer was that he asked the officer if it was possible to get the copy of the sheets for his brother as he did not want to get some false claims (R. 58). He said he gave Joe Darrow the hundred dollars as he didn't want his brother pushed around; and if he could get a copy of the sheets for his brother, he knew he would get a lot of claims the following day. (R. 58). He asked where his brother was and the officer told him his brother was still in his apartment. He said wait until he got down to the apartment and he would let him know if his brother had been taken downtown yet. (R. 59). He said his brother had never been in any trouble and he didn't want him to get pushed around and he then gave the officer two, tossed him two fifty-dollar bills. The officer said he would take care of his brother, and he wouldn't get pushed around. (R. 59). When he made the telephone call to where his brother was arrested, he was in Santa Ana, visiting his daughter. She had just come back from the East. She had just been married and he had gone to San Diego to see her (R. 60). He denied that he had any people he had accepted wagers from (R. 51). He denied that he had been engaged in bookmaking activities since two and one-half years before (R. 61). He never discussed the stamp tax with the officers (R. 62). He denied that he had told officer Holmes that he was engaged

in bookmaking activities or that he was leaving bookmaking. He said that he was concentrating on the clothing business. He said that he did not know that the phone in Alhambra was being used for bookmaking. He was surprised when he learned that his brother had been pinched for bookmaking (R. 64). He admitted a prior conviction of a felony for desertion from the United States Army (64, 65), and that he had been convicted of bookmaking (R. 66). Charles M. Holmes testified he is a police officer with the administrative night squad in the City of Los Angeles, that he had a conversation with the appellant during the arrest of the amount that he paid to the clerk in bookmaking establishments. He testified to various conversations with the defendant. In the second conversation, he told the officer he did not have a book going, that he had quit, that things were too hot. It was obvious that the officer had an informant who was turning in his spots (R. 72). In rebuttal, the government officer played a tape recording had with the defendant at the police station (R. 78). There was no statement in the recording that the appellant drove in his Lincoln automobile, except to the place where the meeting occurred between the officer and himself, with reference to copying the sheets involved.

## III.

## SPECIFICATION OF ERRORS

(1) The evidence is insufficient to support the findings and judgment. The judgment is contrary to the law and the evidence.

(2) Sec. 7301, of the Internal Revenue Act of (1924) was unconstitutionally construed and applied in this case.

Section 7301 inherently and as construed and applied violate the Fifth Amendment to the U. S. Constitution.

## I.

## THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT. THE FINDINGS AND JUDGMENT ARE CONTRARY TO THE LAW AND THE EVIDENCE.

The pleadings charged that the automobile was used for receiving wagers and that Joseph D'Agostino "was receiving wagers on a certain date (February 28) in this automobile." (R. 6.)

There is not one word to support this allegation of the complaint.

There is not even a scintilla of evidence that appellant ever received a wager in this automobile, nor that this automobile was used in "receiving wagers."

The words "receive" and "wager" and "in" are words well known, and well defined.

A bet or wager could be "received" "in" an automobile and an automobile could be used as a place where bets are made or received. But this is not the evidence.

The evidence is that a brother of the appellant, Sam D'Agostino was arrested at an apartment at 2602 West Grand Avenue for suspicion of bookmaking on February 27. (R. 7.) The arresting officer thereafter received a call from appellant who asked the officer to meet him at a "76" gas station at Fremont and Main Street, Los Angeles (R. 7) and to come alone.

At the subsequent meeting the appellant gave the officer two fifty dollar bills. Appellant had a conversation with the officer, stating all he was interested in was getting a copy of the betting markers, as he indicated, the sheets. (R. 9.) The officer stated it was impossible to get them right then and they made plans for a later date, which was the next day, February 28, 1957 at 3:30 p.m. At that time the officer and officer Holmes entered appellant's vehicle. (R. 10.) At that time the officer had the betting markers with him, and told appellant he could copy them. (R. 10.) He had a conversation with appellant in which appellant stated he settled one of his accounts at the fights. "That is the only conversation I had regarding the use on his activities in the bookmaking field." (R. 11.) He added "that he settled up with this party once a week at the fights." (R. 11.)

The markers are the markers he found *"at the house."* (R. 12.)

When the officer got in the car he did not give appellant any wager. (R. 16.)

Not one word in this or any subsequent evidence shows that appellant "received" a bet "in the vehicle."

Nor is there any evidence that appellant was engaged in accepting wagers on or about February 28, in the automobile.

We think fair construction of the statute, if constitutional, means that the automobile was used as a place for receiving bets—not that it was used as a means of transportation for the bookmaker. (See *U. S. v. Lane Motor Co.,* 344 U.S. 630.

The government called appellant as an adverse witness under Rule 43b (R. 39). He denied using the automobile to receive wagers. (R. 39.)

Carl Anthony Landi testified he is a clothing manufacturer at 8216 Lankershire Boulevard, North Hollywood and that appellant is his partner. That he was with him on the day appellant met police officers. (R. 52.) At no time while he was with appellant that day did he receive any wagers on any horses. (R. 50.)

Appellant denied being engaged in bookmaking activities for 2½ years (R. 63). By way of rebuttal and impeachment the government produced evidence of conversations of officers with appellant and a tape re-

cording (R. 68-75). The tape recording was offered as "admissions against interest." (R. 75.) The evidence is insufficient to show that the car was used for receiving wagers that any wager was ever made in the automobile.

Forfeiture statutes and pleadings must be strictly construed. Congress and not the courts should say so in clear, unmistakable language as it has done in Title 49, Section 781-2 in the case of narcotics, firearms and counterfeit money.

## II.

## SECTION 7301 OF THE INTERNAL REVENUE CODE INHERENTLY AND AS CONSTRUED AND AS APPLIED IN THIS CASE HAVE BEEN UNCONSTITUTIONALLY CONSTRUED AND APPLIED IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES THAT NO PRIVATE PROPERTY SHALL BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

### A

Seizure and forfeiture of an automobile is a serious thing. Forfeitures are not favored. They should be enforced only when within both letter and spirit of the law.

*Farmers & Merchants National Bank v. Dearing,* 91 U.S. 29, 33, 35, 23 L. Ed. 196, 198, 199;
*U. S. v. One 1936 Model Ford,* 307 U.S. 225, 227.

B.

As construed and applied in this case the government contends that because the appellant met a police officer to copy the O sheets and betting markers seized from his brother, at an apartment, that the automobile is to be forfeited. We respectfully submit that nothing in the statute, which must be strictly construed and applied, extends to such a doctrine. For which reasons and each of them we urge for a reversal of the judgment below and order to return the automobile to its owner, Joseph D'Agostino.

C

The Fifth Amendment to the U. S. Constitution forbids the taking of private property without just compensation. A forfeiture statute does that. Therefore the only property which may be taken is "contraband" which has always been considered subject to seizure. *Boyd v. U. S.*, 116 U.S. 616. But a statute which makes an innocent article, such as an automobile, subject to seizure by legislative fiat is contrary to the letter and spirit of the U. S. Constitution and unconstitutional and violates the Fifth Amendment to the U. S. Constitution.

*Boyd v. U.S.*, 116 U.S. 616.

At common law in England forfeiture was the consequence of conviction and attainder on indictment for treason or felony. This was followed by forfeiture

of the life of the offender as well as his lands and goods. The forfeiture was to the King. The desire of the King and his officers to realize the profits of these forfeitures was one of the chief motives in instituting the circuit of King's Bench. "Attainder" was the inseparable consequence of the sentence of death. The consequence of attainder was forfeiture. Conviction of felony of any kind resulted in forfeiture of goods and chattels. But the Constitution of the United States forbids the passing of any bill of attainder.

We submit that the attempt to forfeit an automobile under the circumstances of this case is but an extension of the seizure of property by the Crown in England and the attainder now forbidden by our own Constitution.

For which reasons we pray for reversal of the judgment and an order restoring the vehicle to Joe D'Agostino.

Respectfully submitted,

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